No. 91-587

Supreme Court, U.S.
FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE INDEPENDENT INSURANCE AGENTS OF AMERICA, INC.; NATIONAL ASSOCIATION OF CASUALTY & SURETY AGENTS; NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, INC.; NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS; NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS; PROFESSIONAL INSURANCE AGENTS OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; INDEPENDENT INSURANCE AGENTS OF DELAWARE; THE DELAWARE ASSOCIATION OF LIFE UNDERWRITERS; and AMERICAN COUNCIL OF LIFE INSURANCE,

Petitioners,

v.

CITICORP,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' REPLY BRIEF

JONATHAN B. SALLET
Counsel of Record
ANN M. KAPPLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, D.C. 20005
(202) 639-6000

DAVID OVERLOCK STEWART
MARTIN E. LYBECKER
RAYMOND C. ORTMAN, JR.
ROPES & GRAY
1001 Pennsylvania Avenue, N.W.
Suite 1200 South
Washington, D.C. 20004
(202) 626-3900

Counsel for the Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONERS' REPLY BRIEF

The Opposition filed by the Solicitor General makes two points. Addressing the merits, the Solicitor General agrees with the Petitioners that the Second Circuit's interpretation of the Bank Holding Company Act ("BHCA") is wrong.[1] Representing federal banking agencies with

[1] Brief for the Board of Governors Of The Federal Reserve System in Opposition ("SG Opp.") at 10.

competing jurisdictional interests, the Solicitor General contends that, nonetheless, this Court need not address itself to the gap that the Second Circuit's decision has opened in the jurisdiction of the Federal Reserve Board.

1. The Solicitor General's brief provides more than ample support for the Petitioners' view that the Second Circuit erred by disregarding what the court recognized to be the "literal application" of the BHCA merely because it was uncomfortable with the results engendered by such an interpretation. SG Opp. at 11-12 & n.5.[2]

2. To support his view that certiorari should not be granted despite the Second Circuit's clear error, the Solicitor General relies most heavily on the assertion that the diminishment of Board authority "does not leave such subsidiaries in a regulatory vacuum." SG Opp. at 12. That is not a surprising view to be taken by the Solicitor General, who represents the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation as well as the Board. But it offers scant comfort to anyone else. The existence of other regulators does not demonstrate the existence of regulators who will take the Board's place "in safeguarding the safety and soundness of the nation's financial system . . ." Pet. App. at 27a (Board Order). That is especially true because the jurisdictional restriction on the Board at

[2]The Brief of Respondent Citicorp in Opposition ("Citicorp Opp.") merely confirms the conclusion that the Second Circuit's reading was based on an impermissible preference for perceived policy over unequivocal language. Thus, Citicorp argues that the Federal Reserve Board has not explained "why it would make any sense" to apply the BHCA in the manner proffered by that administrative agency. Citicorp Opp. at 8; *see also id.*, at 10 (Board's view "makes no sense."). As this Court has explained, the literal language of a statute is to be applied "even to those who fail to grasp the purpose of legislative distinctions. *See West Virginia University Hospitals, Inc. v. Casey*, ——— U.S. ———, 111 S.Ct. 1138, 1148 (1991).

issue here applies to *all* activities, not just to insurance sales and underwriting.

Consider the underwriting of securities. If the Second Circuit decision is upheld, then the Board will be powerless to regulate the securities activities of nonbanking subsidiaries of subsidiary non-member banks. To be sure, the FDIC retains supervisory authority over FDIC-insured banks, but significant differences have arisen between the Board and the FDIC on this issue. For example, without Board jurisdiction, nonbanking securities subsidiaries would be free to underwrite, sponsor and advise open-end mutual funds, to receive *all* of their revenue from risky underwriting and dealing activities traditionally ruled off-limits for banks, and to act generally as market makers and specialists.[3]

Moreover, the Board applies more stringent "firewall" protections than does the FDIC to the securities activities it rules permissible. The Board requires that a securities affiliate stand on its own financial feet. It does so by, for example, (i) restricting loans between the bank and the securities affiliate, (ii) excluding capital of the securities affiliate from the bank's risk-based capital for purposes of applying international rules, (iii) severely limiting overlapping officers, directors and employees between the securities affiliate and the bank, (iv) limiting the ability of the securities affiliate to sell securities it has underwritten to affiliates during the underwriting period and in the aftermarket, (v) protecting the confidentiality of customer information, and (vii) separating the marketing of securities from the marketing of bank products. *See Toronto-Dominion Bank*, 76 Fed. Res. Bull. 573 (1990). The FDIC has not imposed as stringent restrictions. *See* 12 C.F.R. 337 (1991).

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[3] *Compare* 12 C.F.R. 337.4(b)(1) & (2) (1991) (FDIC regulation) *with Dauphin Deposit Corporation*, 77 Fed. Res. Bull. 672 (1991).

The importance to the Board of requiring financial integrity is demonstrated by past and current events. For example, in the days following the stock market crash of October, 1987, Continental Illinois National Bank and Trust Company violated regulatory instructions by loaning $130 million to its securities subsidiary in order to keep the subsidiary from collapse. *See* "Regulator Blasts Continental Aid to First Options," American Banker (Feb. 4, 1988). And this year, the securities subsidiaries of banks have moved aggressively into the troubled junk bond market. *See* "US Commercial Banks Step Up Underwriting Junk Debt," Reuters Financial Report (Nov. 27, 1991). Board oversight of this—and other risky enterprises—is more important than ever.

3. The Solicitor General notes the passage of recent legislation that would limit the future entry of banking institutions into the underwriting of insurance. The new legislation generally provides that the subsidiary of an FDIC-insured state bank may only engage as principal in activities that are permissible for subsidiaries of national banks or are permitted by the FDIC. As to insurance, a specific provision limits *future* entry into insurance underwriting, *except to the extent permitted for national banks*. *See* S. 543, 137 Cong. Rec. H11,793 (daily ed. Nov. 26, 1991) (Section 303(d)(2)(A)). In other words this is a prospective limitation—not applicable to the situation at hand—of uncertain content—because it depends upon the ability of the Office of the Comptroller to authorize insurance underwriting for national banks. As the State of Delaware has observed, the new legislation "is not relevant to or dispositive of any of the issues presented by this petition for certiorari." [4]

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[4] Brief in Opposition to the Petition for Writ of Certiorari of the State of Delaware ("Delaware Opp."), 3.

In any event, the new law does not specifically address the many other nonbanking activities affected by the Second Circuit's decision—*e.g.*, sale of insurance, underwriting and sale of securities, and

4. Finally, the Solicitor General argues that the "practical importance" of the case may be "short-lived" because of the prospect of future congressional action. Anything is possible, of course, but it should be noted that (i) Congress has refused since 1982 to revise the basic nonbanking provisions of the BHCA, (ii) every proposal (from every competing corner) advanced in 1991 to take such action was rejected by Congress when it passed this year's banking measure, and (iii) Congress's banking agenda is not likely to be significantly more ambitious as it enters an election year and prepares for a presidential election. In the normal course, the Solicitor General's speculation that Congress *might* fix the Second Circuit's egregious misreading of the BHCA would not render this case any less certworthy. The fact that any such fix is highly improbable makes his argument entirely unfounded.

In other words, this is a case where the practical implications of the Second Circuit decision requires this Court's immediate attention.

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real estate development. The decision below prevents the Board from regulating these activities if they are shifted to the subsidiaries of holding company banks.

CONCLUSION

For the reasons stated herein and in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN B. SALLET
Counsel of Record
ANN M. KAPPLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, D.C. 20005
(202) 639-6000

DAVID OVERLOCK STEWART
MARTIN E. LYBECKER
RAYMOND C. ORTMAN, JR.
ROPES & GRAY
1001 Pennsyivania Avenue, N.W.
Suite 1200 South
Washington, D.C. 20004
(202) 626-3900
Counsel for the Petitioners